BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MIGUEL VASQUEZ	)	
Claimant	)	
VS.	)	
	)	Docket No. 251,705
THE HUB OF SYRACUSE	)	
Respondent	)	
AND	)	
	)	
BITUMINOUS INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appeals from a preliminary hearing order entered by Administrative Law Judge Pamela J. Fuller on June 15, 2000.

ISSUES

Claimant was injured while preparing to weld a metal basket his wife had given him from the restaurant where she worked. The Administrative Law Judge denied claimant's application for temporary total disability benefits and payment of medical expenses. Although the ALJ's order does not state the reason for denying benefits, the parties agree that the issue on appeal is whether claimant's injury arose out of and in the course of his employment with respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes the order by the ALJ should be affirmed.

Respondent engages in a variety of business activities, including oil field construction, plumbing, and grave digging. Claimant was hired as a water truck driver but claimant also did some work digging graves and welding. The evidence establishes that respondent gave employees permission to use the welding equipment for personal projects. Garland Smith, respondent's manager, testified that the employees were told they could use the shop and equipment only on off-duty hours. Claimant denies that the permission was limited to off-duty hours. Mr. Joe Ochoa, another employee, testified he

did not remember being told, but it was understood personal use was limited to off-duty hours.

Claimant's wife worked for Leyva's Restaurant and on November 19, 1999, claimant, Garland Smith, and Joe Ochoa went to lunch at Leyva's. While there, claimant's wife gave claimant a chrome basket used to make tortilla shells at the restaurant and asked him to weld it. After lunch, claimant placed the basket in the back of the pickup. Garland Smith noticed the basket and asked claimant about it. Claimant told Smith it was a basket they had asked him to weld. Claimant later told Joe Ochoa that he, claimant, was going to get a free lunch out of it. Claimant denies this, but the Board finds this testimony to be credible. It is confirmed by testimony of Garland Smith who overheard something to this effect said in Spanish. Nothing in the records indicates respondent's manager, Garland Smith, was asked to have the welding done or that he gave permission for it to be done on company time. The restaurant owner testified she expected to be billed, but nothing indicates she was told she would be or who would bill her.

Before lunch claimant was digging graves and was to return to the shop to work on steps being built for respondent. After lunch Smith instructed claimant to finish the grave and then return to work on the stairs. Claimant did finish the grave, but when he returned to the shop he began working on the basket. While grinding grease off the handle to the basket, the wire brush caught the handle and flung it into claimant's jaw, causing the injury at issue here.

Claimant has the burden of proving his right to an award of compensation and of proving the various conditions on which that right depends. One of the conditions that must be proven is that the injury arose out of employment. K.S.A. 44-501(a). In this case the Board concludes the evidence does not satisfy that burden. The Board acknowledges appellate decisions, cited in claimant's brief, that hold that the employee need not be engaged in an activity directly beneficial to the employer for the resulting injury to be considered compensable. In *Hilyard v. Lohmann-Johnson Drilling Co.*, 168 Kan. 177, 211 P.2d 89 (1949), for example, the Court awarded compensation for injury that occurred while an oil rig worker was doing maintenance on his own car. But the evidence there also showed that the employees used their own cars to do errands for the employer, going to and from town. In this case, the Board concludes claimant was, at the time of the activity, engaged in work that was for a purely personal benefit, having no benefit to the employer. Under these circumstances, the Board agrees with and affirms the conclusion the injury did not arise out of employment.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing order of Administrative Law Judge Pamela J. Fuller, dated June 15, 2000, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day August 2000.

BOARD MEMBER

c: Mark E. McFarland, Garden City, KS
Richard A. Boeckman, Great Bend, KS
Pamela J. Fuller, Administrative Law Judge
Philip S. Harness, Director